THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EARL GORHAM Employee	OEA Matter No. 1601-0146-04
v.	Date of Issuance: February 16, 2006
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS Agency	Lois Hochhauser, Esq. Administrative Judge

James T. Maloney, Esq., Employee Representative
Fred Staten, Agency Representative

INITIAL DECISION

INTRODUCTION

Employee filed a petition with the Office of Employee Appeals (OEA) on July 6, 2004,[1] appealing Agency's action of removing him from his position as a Correctional Officer.[2] At the time of the removal, Employee was in full-time permanent status and had been employed by Agency for approximately fifteen years.

The matter was assigned to this Administrative Judge on February 1, 2005. The pre-hearing conference was held on March 9, 2005. The hearing took place on June 16, 2005 and

[1] An amended petition was filed November 23, 2004.

[2] The final Agency notice was issued on June 4, 2004. However, Employee had been summarily removed from his position effective April 20, 2004. (Exs J-2, J-3).

November 8, 2005.[3] At the hearing, the parties were given the opportunity to, and did in fact, present both documentary and testimonial evidence[4] as well as arguments. Closing arguments were due on February 3, 2006 and the record closed on that date.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Did Agency meet its burden of proof regarding its decision to terminate Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Employee was notified by letter dated April 19, 2004, that he was summarily removed from employment as a Correctional Officer, effective April 20, 2004 based on DPM § 1617, Summary Removal: General Discipline. (Ex J-2). The reasons for Agency's action were contained in a letter to Employee dated April 23, 2004. (Ex J-3). Employee submitted a response on May 2, 2004. Proposing Official Regina Gilmore recommended to Deciding Official Odie Washington, that "the summary removal for cause under DPM §1603.4 for an act that interfered 'with the efficiency or integrity of government operations' be sustained". (Ex J-4). On June 4, 2004, Agency issued its final notice, terminating Employee from his position charging:

> The evidence shows and you admitted that you verbally threatened to do bodily harm to Correctional Officers Lonnie Simmons and Ernestine Copeland because you believed the two of them were involved in a romantic relationship and you were in love with Officer Copeland. On Sunday, March 14, 2004 while in your private vehicle you followed Officer Simmons to the parking lot where fellow Correctional Officer Austin Whitby resides, pulled out a black object that appeared to be a gun in a holster, and threatened Officer Simmons with the statement "I'm gonna bust a cap in your ass!"

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[3] A second hearing date was needed because a recording malfunction was discovered when the transcript of the first hearing was being prepared. After the parties reviewed the June 16 transcript, they agreed that only the testimony of one witness, i.e., Lonnie Simmons, had to be taken again. This took place on November 8.

[4] Witnesses testified under oath. The transcript of this proceeding is cited as "Tr" followed by the volume(I for June 16, II for November 8) and page numbers. Exhibits (Ex) introduced jointly are cited as "J" followed by the exhibit number. Exhibits introduced by Agency are cited as "A" followed by the exhibit number. No documentary evidence was introduced by Employee.

> The evidence also documents that you left threatening telephone messages for Ernestine Copeland on her private telephone, in which you threatened her and Officer Simmons with bodily harm. . .
>
> Your behavior is a clear violation of criminal statues and D.C. Personnel Regulations in Chapters 16 and 18. (Ex J-5).

Agency concluded that this conduct "constitut[ed] a criminal offense, whether or not such act or omission, results in a conviction"[5] Agency determined that the conduct:

> a. Threatened the integrity of government operations;
> b. Constitutes an immediate hazard to the agency, to other District employees, or to the employee. . . (Ex J-3).

Employee, Ernestine Copeland, and Lonnie Simmons are Correctional Officers at the D.C. Jail, and Employee and Officer Simmons worked the same shift, finishing their tour-of-duty at approximately 8:00 a.m. on March 14, 2004.

Wanda Patten, criminal investigator of Agency's Office of Internal Affairs,[6] investigated the charges against Employee. She testified after interviewing Employee, Officer Simmons, Officer Copeland and Officer Austin Whitby, she concluded Employee made verbal threats against Officers Simmons and Copeland and that his conduct was inappropriate. (Tr- I, p. 27, Ex A-1). She testified Employee told her he followed Mr. Simmons to Mr. Whitby's home on March 14, 2004, because he thought Mr. Simmons and Ms. Copeland were romantically involved and he was upset. He stated that he told Mr. Simmons he would "put lead in his ass", but told Ms. Patten that he did not mean it. (Tr-I, p. 22). The witness testified Employee gave her a written statement, that before he signed it, she gave it to him to review and make any changes, and that he made no corrections. He signed the statement on March 19, 2004.

Lonnie Simmons, a Correctional Officer for approximately 20 years, testified that on March 14, he noticed Employee's vehicle behind him as he was driving from work to Mr. Whitby's home. When he arrived at the parking area where Officer Whitby lives, Employee pulled up beside him. Officer Simmons stated he then got out of his vehicle and asked Employee why he was following him. Further,

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[5] Agency Director dismissed the charge of insubordination.

[6] She is now Supervisory Criminal Investigator.

> He's like, I'm tired of you MFs and bitches –the bitch Copeland playing with me. And I'm like, what is he talking about, man? What's wrong with you? I mean, why you following me? I mean, he thought I came over to see – Copeland going to be there with me or something? You know. And then he kept rambling off. And . . . he say he going to bust a cap in my ass. And I'm like, you know – and then he say – like, he looked upset or something . . . And then [Employee] like, man, I'm sick of all you motherf'ers, and, like, I'm going bust a cap in – in your ass. And then he just sped off.

(Tr-II, pp. 9-10).

The witness stated he went to Court and filed for a restraining order. (Ex A-4). He testified he withdrew it after talking with Employee who apologized. Officer Simmons stated he wanted Employee to stay away from him and "maybe try to get help or something". He did not want to get Employee in trouble. (Tr-II, p. 11).

Officer Simmons stated that for four or five months before the March 14 incident, Employee repeatedly asked him about his relationship with Officer Copeland, but the witness did not consider it "really hostile". (Tr-II, p. 16). He said Employee would tell him he could not stay away from Officer Copeland, and the witness thought "something just ain't right" with Employee. (Tr-II, p. 17). Officer Simmons stated his only relationship with Officer Copeland was that of co-workers, and that although at times she had given him a ride to and from work, he stopped riding with her because he "didn't want no trouble" from Employee. (Tr-II, p. 16). He stated he did not kid around or joke with Employee. (Tr-II, p. 18). Mr. Simmons stated that he did not report earlier threats made by Employee at the D.C. Jail because they were not directed toward him. (Tr-II, p. 22).

When asked what he thought Employee meant by his statement on March 14, Mr. Simmons responded that he felt the statement was directed specifically at him and he took it "seriously":

> I took that to mean he was going to shoot me. I mean, he had said that before, in the parking lot. Now, he wasn't referring to me exactly. You know, he was just referring that he would bust a cap in somebody, you know, for–toward–toward her.
>
> You know, he would bust a cap in somebody's ass, you know. And like I said, but I didn't pay him no mind. Like I say, he just stepped over the bounds. That's all. And enough was enough . . . .

> Oh, I took it seriously . . . because like I say, this is off the job and–you know, but I could have been going home. Then it really would have escalated then.

(Tr-II, pp. 18-19).

The witness testified that Employee's statement on March 14 made him fearful because he thought Employee "had something in his car, and you don't just follow nobody for nothing. He had some intention". (Tr-II, p. 23). He said when he saw Employee was following him from work, he sped up, hoping to lose him, and was upset that he did not. (Tr-II, p. 24). He said he got out of his vehicle to talk with Employee, remaining approximately four feet away from him. He stated he was not yelling. Officer Simmons said he initially got closer to Employee, but moved backed because "something just wasn't right with [Employee]". The witness testified Employee made some type of reaching motion, and when he did, the witness stepped back. (Tr-II, p. 29). He felt from the way Employee looked, that "Employee was going to start something, because why'd you follow me?" (Tr-II, p. 26).

He stated he took Employee's statement personally on March 14 because it was directed at him:

> [H]e was arguing and saying, I'm going to, you know, bust a cap. And I guess–like I say, he reached, like, beside hisself . . . And he had–it appeared to me to be a weapon . . . [H]e never pulled or never aimed at it, but it was, like there. And he brought it–and I was scared for my life; you know . . . I guess trying to scare me or whatever. . . .

(Tr-II, p. 28).

Austin Whitby, a Correctional Officer for about 15 years, stated he knew Employee and that they worked the same shift. He testified that on March 14, 2004 he heard Employee and Officer Simmons in a "heated [verbal] exchange" in the parking area of his complex, and asked them to calm down. (Tr-I, p. 31). He confirmed that he heard Employee tell Officer Simmons he would "[not] have a problem putting a cap in [his] ass" and he understood that to mean Employee would not have a problem shooting Officer Simmons. (Tr-I, pp. 38, 42). He described Employee's tone as "aggressive". Mr. Whitby testified that after making that statement, Employee drove away.

Ernestine Copeland testified she has been employed by Agency as a Correctional Officer for about 17 years. She stated she worked with Employee for a number of years and that they had engaged in a brief intimate relationship. She testified that although Employee wanted to

continue the relationship, she did not, noting that Employee was married. (Tr-I, pp. 46-47). Officer Copeland testified that Employee had her first name tattooed on his body. (Tr-I, p. 53).

Officer Copeland described her relationship with Officer Simmons as that of a co-worker. (Tr-I, p. 47). She stated she sometimes gave Officer Simmons a ride to or from work. She disagreed with the use of the word "jealousy" to describe Employee's reaction when he found out she was giving Officer Simmons a ride to or from work:

> I don't call that jealous. I call that rage. I call that anger. I call that hatred. I don't call that jealousy . . . [Employee] was a rage (sic) , call you all kind of terrible names. So I don't call it jealousy . . . I think it come from another place within him. But I don't think it's jealousy.

(Tr-I, p. 48).

Officer Copeland testified that Employee had threatened her on more than one occasion, but she did not do anything about it because she did not want to get Employee in trouble or want to "snitch" on a co-worker. However, she felt she had to report the threats to authority when Employee threatened Officer Simmons. (Tr-I, p. 49-50).

She testified Employee was authorized to have a weapon, that he did possess a weapon and that she had last seen him with it about three years earlier. (Tr-I, pp. 54, 62-65) . Officer Copeland stated that Employee had left threatening messages on her cell phone. (Tr-I, pp. 68-71).

Employee testified he had been employed by Agency as a Correctional Officer for about 16 years at the time he was terminated. He stated that on the morning of March 14, he followed Officer Simmons in his vehicle after work because he wanted to find out if Officer Simmons was having a relationship with Officer Copeland. (Tr-I, p. 82). He stated he was not carrying a weapon, but had a flashlight in a holster. He said when Officer Simmons stopped his car, he "pulled around" the vehicle and also stopped. (Tr-I, p. 82). He said Officer Simmons then exited his vehicle and "started jumping up and down raving and starting to say, man, I told you I'm not messing with her". (Tr-I, p. 83). Employee stated:

> And I told him – I say, I just want to know what's going on, the truth. And if something happened, let me know what's going on, because I ain't got no problem busting a cap in somebody's ass. And that was it. I drove off.

Id.

Employee stated he did not intend to threaten Mr. Simmons with any violent harm and that he did not display a weapon. He testified he said "somebody's ass", not identifying a particular person. *Id.* He stated his hand was on the gearshift and he did not reach for the flashlight. *(Id).* When asked what his statement meant, he explained "cap in the ass means, I guess, shoot – shoot you". (Tr-I, p. 87). He elucidated that the statement meant he "had no problem putting a cap in somebody, which means that I ain't got no problem, I guess, shooting somebody, whatever". (Tr-I, p. 88).

Pursuant to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. OEA Rule 629.1 requires that the burden be met by "a preponderance of the evidence", which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". Based on a careful review of the documentary and testimonial evidence presented in this matter, the Administrative Judge concludes that Agency has met its burden of proof that Employee's conduct threatened the integrity of government operations, and constituted an immediate hazard to District employees.

According to Black's Law Dictionary (5th Ed., 1979), a threat is defined as:

> The term, "threat" means an avowed present determination or intent to injure presently or in the future. A statement may constitute a threat even though it is subject to a possible contingency in the maker's control. The prosecution must establish a "true threat," which means a serious threat as distinguished from words uttered as mere political argument, idle talk or jest. In determining whether words were uttered as a threat the context in which they were spoken must be considered.

The facts are largely not in dispute. On March 14, Employee followed Officer Simmons from the Jail to Officer Whitby's home. When asked by Officer Simmons why he followed him, Employee told him he wanted to know about Officer Simmons's relationship with Officer Copeland and that he would not have a problem shooting someone. Employee stated he really did not intend to hurt anyone. However, his intention is not at issue. There is no evidence that these individuals had the kind of relationship where it would be unreasonable to view the words as threatening. However, there was evidence that Employee had made similar threats in the past, and no action had been taken to report it to Agency. Both he and Officer Copeland testified that they had not reported Employee in the past because they did not want to get him in trouble.

The context of the words on March 14 is critical. Officer Simmons stated that the threats on that day differed from earlier ones, because Employee had followed him from work, and directed the comments to him. He considered Employee to be serious and was frightened by Employee. He thought he saw a weapon, although there was insufficient evidence to establish the existence of a weapon. Therefore, the removal must be based solely on the words and the context in which they were spoken.

Employee followed Officer Simmons from work, and the discussion was so loud that Officer Whitby had to tell them to quiet down. Whether Employee would have followed through with the threat is not pertinent. In the context of what took place, it was reasonable for an individual to be fearful of the threat and therefore reasonable for Agency to take immediate action to remove Employee. It is important to consider that these employees work in a correctional institution and that even if Employee did not have a weapon at the time, the general belief was that Employee owned a weapon and that he could carry out the threat.

Matters involving threats must be determined on a case-by-case basis. In *Metz v. Department of the Treasury, Federal Law Enforcement Training Center,* 780 F.2d 1001 (Fed. Cir. 1986), the employee was fired for threatening his supervisors after he received an "excellent" rather than an "outstanding" rating. The Court stated that while threats are a serious matter that impairs the efficiency of the service, it is difficult at times to determine if a threat has been made. Citing *Meehan v. United States Postal Service,* 718 F.2d 1069, 1075 (Fed. Cir. 1983), the Court stated that the trier of fact must use "the connotation which a reasonable person would give the words" to determine if the words constitute a threat. In applying the "reasonable person standard", the Court determined that the following evidentiary factors had to be considered to determine if an employee threatened a co-worker or supervisor:

(1) The listener's reactions;
(2) The listener's apprehension of harm;
(3) The speaker's intent;
(4) Any conditional nature of the statements; and
(5) The attendant circumstances.

The Court directed that the Merit Systems Protection Board consider both objective evidence, such as the actions, if any, taken by the person to whom the threatening words were directed; and subjective evidence, for example, how the person to whom the words were directed felt after hearing the words. In *Metz*, the Court reversed agency's decision to terminate the employee, noting that the two individuals who heard the threats did nothing and the supervisor to whom the threats were directed testified that he did not fear Metz or expect him to carry out his threats. No one reported the threats to the agency, rather it was disclosed to another supervisor during a casual conversation.

OEA has followed this analysis. In *James E. Johnson, Sr., v. D.C. General Hospital,* OEA Matter No. 1601-0029-92 (February 2, 1999), _____ D.C. Reg. _____ ( ), Senior Administrative Judge Daryl J. Hollis reversed an agency's removal of an employee who told his supervisor that "if we were at the top of the hill . . . I would kick your motherfucking ass". Judge Hollis found the threat to be conditional, noting that the individuals were not at the top of the hill, the supervisor testified he was not frightened by the statement, the supervisor did not react to the words and responded by ordering the employee to return to his post. On the other hand, in *Long v. Department of Public Works,* OEA Matter No. 1601-0084-90 (August 5, 1993), _____ D.C. Reg. _____ ( ), Administrative Judge Blanca E. Torres sustained the removal finding that the employee's failure to immediately attack the individual he threatened did "not negate the element of threat in his words and his actions". In this matter, the person to whom the threats were directed testified that he felt threatened and took action.

Credibility determinations are important in these matters since the finder of fact must determine if the person to whom the threat is directed felt threatened by the words or actions. Credibility assessments are within the province of the administrative judge who has the opportunity to make credibility determinations by assessing the demeanor of a witness, the character of the testimony, the self-interest of the witness, and the existence and nature of supporting documentation. *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. 1985). Based on those factors, the Administrative Judge found Officers Whitby and Simmons to be credible and convincing witnesses.

Lonnie Simmons testified that he felt threatened by Employee's words and actions. He noted that this was not the first time Employee had made threats, but it was the first time the threats were directed at him and that Employee had followed him from work to a friend's apartment. His testimony about his increasing concern about Employee was credible and reasonable. He stopped accepting rides with Officer Copeland because it upset Employee. He tried to lose Employee when he saw him behind him on March 14. Employee's testimony of Officer Simmons's reaction, i.e., yelling at him that he was not in a relationship with Officer Copeland, supports Officer Simmons's testimony that he was frightened that Employee was going to harm him.

Employee's testimony was at some variance with his written statement. He testified that he did not specifically direct his threat at Officer Simmons. However in his written statement he said, "I told Simmons that I would put some lead in his ass, but I didn't mean it". The Administrative Judge assessed Employee's demeanor during the hearing, and found his written statement to be more reliable. It was taken closer to the time of the incident, and was more unequivocal in its language. She concludes that Employee's threat on March 14 was directed at Officer Simmons.

Employee was also asked in his statement if he had told anyone at the Central Detention Facility of his intent or desire to harm Officers Simmons and Copeland. He responded "Yes, that could have happened out of anger". (Ex A-1). Officer Simmons did not appear to be aware of prior direct threats against him, but this testimony again goes to the "attendant circumstances". Employee stated he made the statements "out of anger", not as a joke or in the abstract.

Employee's written statement also provides a context for the events that took place. In that statement, he asserted that he and Officer Copeland were in a continuing intimate relationship for the past four or five years. He stated Officer Copeland told him she was also involved in an intimate relationship with Officer Simmons and that Officer Simmons told her he was leaving his wife. Employee stated he was "upset" by the remarks and that when he asked Officer Simmons about it, Officer Simmons denied he had told this to Officer Copeland.

When asked if he loved Officer Copeland, Employee stated:

> Yes, I have a lot of feelings for her. I find myself thinking a lot about her and who she's with when I'm not around. We do a lot of things that I like to do together. I've met her entire family and she has met mine.
>
> I placed a tattoo of her name on my left arm since I've been married to my wife. Copeland was with me and said that she would pay for it. She paid $100.00 to have it done.
>
> She runs around the building telling me to show it . . . [to] everybody - her name on my arm.

Id.

The Administrative Judge does not know the nature or duration of the relationship between Officer Copeland and Employee. Their descriptions of the relationship are too divergent to be reconciled. The Administrative Judge assumes that the relationship was something in between the two descriptions. Regardless, it is clear that Employee thought the relationship was a continuing one and that he thought about her and was concerned with who she was with when they were not together. Employee's final statement to the investigator was that Officer Copeland was "playing me and Simmons." *Id.* This may be true. Employee's jealousy regarding what he perceived as Officer Copeland's relationship with Officer Simmons may have been fueled by Officer Copeland, but Employee must be held responsible for the threatening conduct on March 14. The fact that Employee drove away and that he did not brandish a weapon do not change the outcome of this matter. Employee engaged in threatening

conduct toward Officer Simmons and Officer Simmons's fear for his safety was reasonable. The two work together as Correctional Officers on the same shift. Although in his statement Employee denied owning a gun, he agreed that correctional officers are permitted by statute to carry a personal weapon while in off-duty status. (Ex A-1). Given Employee's strong emotions, threatening conduct, and availability of weapons, it was reasonable to assume that Employee could carry out his threat at any time. Agency met its burden that Employee engaged in conduct that constituted a criminal offense, threatened the integrity of government operations and constituted an immediate hazard to District employees. His conduct reasonably caused Officer Simmons to be fearful for his safety and well-being. Officer Simmons took action to ensure his safety and was it was reasonable for him to do so.

With regard to the telephone threats, Employee did not dispute Officer Copeland's testimony that he had left threatening statements on her answering machine. However, using the *Metz* analysis, the result is different from the result of the March 14 threat. Officer Copeland did not take any action regarding the threats. She stated that she did not want to get Employee in trouble or be considered a "snitch". She did not exhibit genuine fear or concern about her safety or well-being. Although the threats do not constitute an independent basis for the removal, they add credence to the volatility of the situation and the atmosphere that resulted in the actions of March 14. Employee admitted in his statement that he made threatening statements in the presence of other employees "out of anger" regarding the supposed relationship between Officers Copeland and Simmons.

The Administrative Judge concludes that Agency met its burden of proof that Employee engaged in threatening conduct toward Office Simmons on March 14, 2004. DPM Chapter 16 § 1603.4 (June 9, 2000) provides in the definition of "cause" that correctional officers may be disciplined for conduct while on or off duty if the conduct constitutes a criminal offense even if it does not result in a conviction. Agency met its burden of proof that the conduct would be considered criminal, that it threatened the integrity of government operations and that it constituted an immediate hazard.[7]

This Office has long recognized that the primary responsibility for managing its employees rests with the agency. Part of that responsibility is determining the appropriate disciplinary measure to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ___ D.C. Reg. ____ ( ). This Office will not substitute its judgment for that of the agency when determining if a penalty should be sustained, but rather will limit its review to

[7] §1603.5 provides that an employee will not be subject to adverse action for a *de minimis* violation. For the reasons discussed, herein, the Administrative Judge has determined that Employee's actions were significant and not a *de minimis* violation of the for cause standard.

determining that "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment". *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985). Utilizing this standard, for the reasons discussed above, the Administrative Judge finds no basis for disturbing the penalty.

In sum, based on the reasons stated above, the Administrative Judge concludes that Agency met its burden of proof and that its decision to remove Employee should be upheld.

ORDER

It is hereby:

ORDERED: Agency's action removing Employee is UPHELD.

FOR THE OFFICE:

Lois Hochhauser/DH
LOIS HOCHHAUSER, Esq.
Administrative Judge